STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WILBUR T. TEAGUE, Complainant, vs. PABST BREWING COMPANY and BREWERY WORKERS LOCAL NO. 9, Respondent.	:	Case X No. 24509 Ce-1822 Decision No. 17023-B

Appearances:

Mr. Steven C. Davis, Attorney at Law, appearing on behalf of the Complainant.

Arvey, Hodes, Costello & Burman, Attorneys at Law, by Mr. Mervin N. Bachman, appearing on behalf of the Respondent Pabst Brewing Company.

Zubrensky, Padden, Graf & Bratt, Attorneys at Law, by Mr. George F. Graf, appearing on behalf of the Respondent Brewery Workers Local No. 9.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a Complaint with the Wisconsin Employment Relations Commission on May 4, 1979, alleging that the above-named Respondents had committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Timothy E. Hawks, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said Complaint having been held before the Examiner in Milwaukee, Wisconsin, on October 9, 1979; and a transcript of said hearing having been received by the Examiner on October 23, 1979; and the parties having made oral arguments at the conclusion of the hearing; the Examiner, having considered the evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Wilbur T. Teague, herein Complainant, was an employe of the Pabst Brewing Company until his discharge on February 28, 1978.

2. Pabst Brewing Company, herein Respondent Employer, is an employer having offices in Milwaukee, Wisconsin

3. Local No. 9, herein Respondent Union, is a labor organization also having offices in Milwaukee, Wisconsin

4. Respondent Union and Respondent Employer are parties to a collective bargaining agreement, effective from June 1, 1977, through June 1, 1979, covering those employes of Respondent Employer, including Complainant, for whom the Union is the exclusive bargaining representative. Said collective bargaining agreement contains a grievance procedure which

provides for final and binding arbitration as the exclusive remedy for unresolved disputes regarding "any differences or misunderstandings which may arise out of the interpretation of any clauses of this contract."

5. The Union refused to process the grievance herein after investigating, reviewing the merits, and submitting the question of arbitration to its executive board and the local membership. Said executive board is comprised of fourteen employes, nine of whom are elected by employes within the various departments of the Respondent Employer and five of whom are officers of the Respondent Union. The Complainant had an opportunity to present his case to the executive board. The executive board concluded that the case lacked sufficient merit to justify proceeding to arbitration and thereafter recommended to the full membership that no further action be taken. The full membership of the Respondent Union ratified the decision of the executive board. On May 22, 1979, John Adam, agent for Respondent Union, notified Complainant of the decision of the membership.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. By concluding not to pursue the grievance of Wilbur T. Teague, the Brewery Workers Local No. 9 did not breach its duty of fair representation with respect to Complainant.

2. Since the collective bargaining representative of Complainant, Wilbur T. Teague, did not violate its duty to fairly represent him, the Examiner cannot assert the Wisconsin Employment Relations Commission's jurisdiction under Section 111.06(1)(f), Wis. Stats., to determine whether Respondent Pabst Brewing Company violated its collective bargaining agreement with the Union when it discharged Complainant, Wilbur T. Teague.

Upon the basis of the above and foregoing Findings of Fact, Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the instant Complaint be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 28th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Timothy E. Hawks
Timothy E. Hawks, Examiner

PABST BREWING COMPANY, III, Decision No. 17023-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent Employer breached the collective bargaining agreement when it discharged him from employment. Moreover, Complainant alleges that Respondent Union breached its duty of fair representation. By way of proof at the hearing, Complainant established only one potential ground to find that the Union had committed such breach--namely, that the Union had at one time communicated to the grievant that it would process his grievance and then at a later time refused to process said grievance.

The Wisconsin Employment Relations Commission, as an agency, has jurisdiction to determine a breach of contract by an employer. However, where grievance arbitration exists, a grievant must exhaust such procedure prior to agency review of an employer's alleged contractual breach. Where, however, the individual grievant is precluded from utilizing this procedure as a consequence of illegal conduct of a union, then such grievant will not be prevented from raising his claim by virtue of said illegal conduct.

Consequently, prior to a determination of the employer's liability, the threshold issue of illegal union conduct, which prevents the grievant from pursuing his contractual claim, must be resolved. Clearly, a union has a legal obligation to represent its members fairly. It may not act in a manner which is arbitrary, discriminatory, or in bad faith. This obligation was first delineated by the Supreme Court of the United States in 1944, and it ruled at that time that the union's statutory right to exclusively represent members of a bargaining unit granted by the National Railway Labor Act was poised equally with its obligation to exercise that right in a fair manner. 1/ In 1955 the U.S. Supreme Court found that unions exercising the exclusive right of representation pursuant to Section 7 of the National Labor Relations Act were also so obligated. 2/ In addition, the National Labor Relations Board found that discriminatory representation by a union constituted an unfair labor practice, as defined by Section 8(b)(1) of that Act, in that such illegal conduct coerced employes' exercise of rights provided them by Section 7 of the National Labor Relations Act. 3/

The Wisconsin Employment Relations Commission has ruled that it could not determine an alleged contractual breach by an employer where the contract contained a grievance-arbitration provision which was not exhausted unless the complainant could show by the preponderance of the evidence that the union had acted unfairly in refusing to process the grievance. 4/

1/ Steele v. Louisville and N.R., 323 U.S. 192 (1944).

2/ Ford Motor Co. v. Huffman, 345 U.S. 330 (1955); Syres v. Oil Workers Local 23, 350 U.S. 892 (1955).

3/ Miranda Fuel Co., 140 N.L.R.B. 181 (1962), enf't denied, 326 F.2d 172 (2d Cir. 1963).

4/ F. Dohman Co. (8419-A,B) 9/68 (aff'd Dane Co. Cir. Ct. 6/70).

However, a showing of only the refusal to process a grievance to arbitration is not sufficient to establish a breach of a union's obligation to represent its membership fairly.

In the instant case the Complainant established only that the grievance was not processed to the arbitration stage. The only additional evidence which might tend to establish some basis for concluding a breach is that testimony of the Complainant that he was at first told his discharge would be arbitrated and then informed to the contrary. Such testimony was refuted by the Business Agent who had represented the Complainant. Said Agent testified further that he had represented the Complainant in an earlier grievance matter and had successfully won the Complainant's reinstatement. In addition, witness for Respondent Union testified that the systematic review of the Complainant's case, set forth in Finding of Fact No. 5 above, established that the grievant had received verbal and written warnings for the offense, as well as a one-day suspension. Further unrefuted testimony elicited the fact that the Union, when it decided not to proceed to arbitration, had relied also upon a determination that the Complainant had been disciplined on nine other occasions during a twelve-month period. Such testimony established that the Union did not act in a manner which was arbitrary, discriminatory, or in bad faith. Even assuming that the Union had indicated by its agents that it would proceed to arbitration, if it thereupon acted in a manner which was not discriminatory, not arbitrary, and not in bad faith, it would be free, after review of the merits of the grievance, to conclude that such grievance was not, in fact, meritorious and deserving of arbitration. Accordingly, the Examiner cannot conclude that the Union breached its duty of fair representation and, therefore, cannot reach the merits of the question as to whether or not the Respondent Employer had breached the collective bargaining agreement.

Dated at Milwaukee, Wisconsin, this 28th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Timothy E. Hawks
Timothy E. Hawks, Examiner